IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 433

ALICE HOWE, AS EXECUTRIX OF THE ESTATE OF MARY E. B. HOWE, DECEASED,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

The brief for the United States in opposition to our Petition for Certiorari makes no attempt to sustain the Circuit Court of Appeals "immediate enjoyment" test. See our Petition, page 9.

The Government's readoption (p. 7) of the qualified-by-discretion test, which they had abandoned at the oral argument, is a confession that they can find in the decided cases no workable test, and hence that it is necessary for this court to clarify the definition of "future ~~intents~~." See our Petition, page 17.

The Government's statements at page 8 have been covered by our Petition. The trustees are not merely "authorized" to distribute income; the trust instrument (Par. 10, R. 8) says they "shall" distribute. From time to time means at reasonable intervals (R. 68, 69). The Government's attempt (middle of p. 8) to distort "other obligations" relies on printed provisions (See our Petition, p. 3, R. 9) that on familiar canons of construction should be regarded as controlled by the typed provisions. The "building program" (foot of Government's p. 8) must be considered in the light of majority control and of the liquidation purpose (See our Petition pp. 12 and 13). No necessity for separate valuing of income now appears, (R. 68) but if such evidence should become material the case should be remanded for that purpose. On the *Ryerson* case, (referred to by the Government, p. 9) see our Petition, page 12.

The opposing brief says at page 10, "While the Government is preparing a petition for writ of certiorari in the Disston case because of a conflict with *Fondren* v. *Commissioner,* No. 88 this Term, the Disston reasoning is confined to gifts to minors and hence is not applicable here." We agree that there is conflict between Disston (CCA 3, July 12, 1944, not yet reported) and Fondren (CCA 5, 141 Fed 2d 419). We do not agree that "the Disston reasoning is confined to * * * minors."

It is our position that the conflict between Disston and Fondren involves points that are involved in Howe and that the Government in asserting the Disston-Fondren conflict is in substance conceding that certiorari should be granted on Howe so that the cases may be considered together.

In our Petition, page 19, we demonstrated in parallel columns a ten-point correspondence between Disston and Howe. The Government's naked observation that "the Disston reasoning is confined to gifts to minors" does not meet our ten points of correspondence. The Disston court did not say that it was making a special rule for minors. It emphasized (no. 4 on p. 19 of our Petition) the fact that the "value of the gifts" was not affected and (our no. 5) the fact that the trust merely recognized what the law "would have interposed." In both cases it was applying rules that are not limited by the boundary between minority and legal age.

The value point traces back to the statement of Congressional intent quoted from *U. S.* v. *Pelzer*, 312 U. S. 399, in our Petition, page 16. Where the supposed obstacles to enjoyment are for the benefit of the *cestuis*, the value to the *cestuis* is not reduced. Hence the trust does not create a future interest under the value test. This point transcends the minority cases. It applies with full force to the Howe case.

The Disston statement that a trust is not "future" merely because it recognizes "what the law * * * would have interposed," is similarly not limited to the infancy field. The principle back of the statement is that the purpose of Congress was to discriminate against future interests *created by the trust*. In our case, as in the Disston case, there are obstacles to the *cestuis'* enjoyment independent of the trust. (Our Petition, p. 15.)

In Fondren, the majority opinion merely cites some of the cases cited in the Howe CCA briefs without giving any further clue as to the ground of decision. The dissenting opinion, however, says, "These children were given the fullest use, possession and enjoyment that was possible sensibly to confer upon children of such tender age. If the reasoning * * * is correct, then there could never be a substantial gift to a baby except a gift of a future interest." This implies that the cleavage between the Fondren judges was on the same lines as that between the government's cases and our cases. The question which cries for solution is whether the courts will look at the purpose of trust clauses having a future aspect (as was done in *Lowden,* 131 Fed. 2d, 127) and at the legal and economic background (Disston, ...; Fondren, dissent; Howe, District Court, R. 24); or will "look to the form" (Howe, CCA opinion, R. 57); Fondren, majority; and other cases cited by the Government).

The Government ignores points III, IV and V (pages 13 to 17) of our Petition, while we have answered all points that the Government has made.

Respectfully submitted,

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